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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

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9 ELROY W. BROWNING, CASE NO. 1:05-CV-00342-AWI-LJO-P

10 Plaintiff, ORDER DENYING PLAINTIFF'S MOTION

11 v. TO COMPEL WARDEN SCRIBNER TO

12 JEANNE WOODFORD, et al., PRODUCE DOCUMENTS

13 Defendants.

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15 Plaintiff Elroy W. Browning ("plaintiff") is a state prisoner proceeding pro se and in forma
16 pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. On August 24, 2006, plaintiff filed
17 a motion for a court order compelling Warden A. K. Scribner to respond to plaintiff's request for the
18 production of documents. Defendants Castro, Jackson, and Lopez filed an opposition on September
19 13, 2006, and plaintiff filed a reply on October 2, 2006.

20 Warden Scribner is not a party to this action. Therefore, the only way for plaintiff to obtain
21 documentary discovery from Scribner is via the issuance and service of a subpoena duces tecum
22 pursuant to Federal Rule of Civil Procedure 45. Plaintiff did not request the issuance of a subpoena
23 and has submitted no evidence that one has been served on Scribner.¹ Absent personal service of
24 a subpoena and a showing of subsequent non-compliance with the subpoena, plaintiff is not entitled
25 to a court order compelling Scribner to produce any documents. In addition, this type of procedure

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¹ Plaintiff filed requests for the issuance of subpoenas duces tecum on September 18, 2006, and September
28 22, 2006. Those requests are addressed in a separate order issued concurrently with this order, and the filing of
those requests does not cure the deficiencies in the motion to compel.

1 can be used all to easily for illegitimate purposes. Plaintiff will be required to provide a declaration
2 to be filed confidentially for the court's eyes only justifying his request, should he still wish to make
3 it.

4 Plaintiff's objection to defendants' opposition as untimely is without merit. Local Rule 72-
5 304(b), which plaintiff cites to, pertains to objections to Magistrate Judges' findings and
6 recommendations, and is inapplicable here. Defendants had twenty-one days within which to file
7 an opposition to plaintiff's motion, and their opposition was timely. Local Rule 78-230(m).
8 Regardless, plaintiff bears the burden as the moving party and he is not entitled to the relief he seeks
9 in his motion, defendants' opposition notwithstanding.

10 Based on the foregoing, plaintiff's motion to compel, filed August 24, 2006, is HEREBY
11 DENIED.

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13 IT IS SO ORDERED.

14 Dated: October 21, 2006
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16 /s/ Lawrence J. O'Neill
17 UNITED STATES MAGISTRATE JUDGE

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